1976

Richard Fitzwater v. Samuel W. Smith : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

RICHARD FITZWATER,

Plaintiff-Appellant,

vs. : Case No. 14569

SAMUEL W. SMITH, Warden
Utah State Prison,

Defendant-Respondent.

BRIEF OF APPELLANT

Appeal from a judgment of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., presiding.

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STATEMENT OF THE NATURE OF THE CASE

The Appellant, Richard Fitzwater, appeals from the decision of the Third Judicial District Court denying his petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

Appellant filed a pro se petition seeking a writ of habeas corpus alleging that his confinement by respondent at the Utah State Prison was illegal and invalid. The matter came on for hearing on March 25, 1976, before the Honorable F. Baldwin, Jr., who denied the petition with prejudice.

RELIEF SOUGHT ON APPEAL

Richard Fitzwater seeks a reversal of the court below with directions that he be released from respondent's custody.

STATEMENT OF FACTS

Appellant, Richard Fitzwater, was committed to the Utah State Prison for the crime of possession of a stolen motor vehicle on October 31, 1974, after being convicted by a jury. (R.9) At that trial Jack W. Kunkler was his attorney. (T.7)

Approximately one month before the case went to trial, Mr. Fitzwater testified in support of his allegation that Mr. Kunkler was not competent counsel in his behalf, Mr. Fitzwater spoke with Mr. Kunkler in the Salt Lake County Jail. (T.12) Mr. Fitzwater gave the names of three witnesses on his behalf who could assist him in a trial. (T.12) At the trial Anthony Buck did not appear and Mr. Kunkler refused to use Anthony Buck as a witness. (T.13) Mr. Fitzwater said that Mr. Buck could have given testimony favorable to him.

Mr. Kunkler testified at the hearing on the petition for a writ of habeas corpus that he recalled Mr. Fitzwater being upset at trial about a witness not being present. Mr. Kunkler did not recall whether or not he had ever heard the name Anthony Buck at the time of Appellant Fitzwater's trial. (T. 24,25,26).

ARGUMENT

POINT I

APPELLANT CONTENDS THAT THE COURT BELOW ERRED IN DENYING HIS PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

The standard in Utah as to what is competent counsel is set forth in Alires v. Turner, 22 Utah 2d 118 (1969) wherein our court recognizes that the failure of proper representation is a departure from due process of law. Our court herein states as the standard that an accused is entitled "to assitance of a competent member of the bar who shows a willingness to identify himself with the interests of the defendant, and presents such defenses that are available to him under the law and consistent with the ethics of the profession." Petitioner contends that such a standard is too subjective to be of any use in evaluating a particular case and in order for a court to determine whether or not effective assistance of counsel has been rendered the facts of each case must be examined and compared with what has been found acceptable or unacceptable under other standards.

The most widely accepted formula implements the least stringent standard of judicial review; incompetence of counsel such as to be a denial of due process and effective representation of counsel must be such as to make the trial a farce, sham or mockery of justice. Such a standard is also unduly vague and therefore its umpredictability and the heavy burden it puts on a defendant deprives him of a reasonable opportunity of being acquitted whenever trial counsel's errors, although serious and prejudicial, were not so blatant as to render the trial a farce. Most federal circuit courts of appeals in the past have followed such a standard. See, for the example, the following cases:

Diggs v. Welch, 148 F.2d 667 (D.C. 1945)
Latimer v. Cramer, 214 F.2d 926 (9th Cir. 1954)
Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965)
Lance v. Overdate, 244 F. 2d 108 (7th Cir. 1957)
O'Malley v. U.S., 285 F.2d 733 (6th Cir. 1961)
James v. Boles, 339 F.2d 431 (4th Cir. 1964)
U.S. v. Gonzolez, 321 F.2d 638 (2d Cir. 1960)

Some courts have more recently begun to formulate more appropriate standards. For example, in Scott v. U.S., 427 F.2d 609 (D.C. Cir. 1970) wherein the court held that a Defendant is required to show that counsel's "gross incompetence blotted out the essence of substantial defense" to prevail on a claim of inadequate representation. Several California cases have followed this approach. See, for example:

People v. Hill, 70 Cal. 2d 678, 452 P.2d 329, 76 Cal. Rptr. 225 (1969)
People v. McDowell, 69 Cal. 2d 737, 447 F.2d 97, 73 Cal. Rptr. 1 (1968)
People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963)

This test has the advantage of allowing a reviewing court to concentrate on a single defense rather than the entire trial. However, this test also provides no guidance for determining what is gross incompetence but only suggests finding of prejudice once gross incompetence is established.

Some more recent standards have evolved which should make it easier for appellate courts to review appeals which bring into issue the constitutional right to effective counsel and which insure that the right is in fact a day-to-day fact of life in our nation's trial courts. The Third Circuit in Moore v. United States, 432 F. 2d 730 (1970) would measure the effectiveness of counsel by using

the touch stone of "community standards" and this way it has in essence adopted that part of the law of torts that recognizes the duty of care but has dropped the requirement that damage be shown.

The Fourth Circuit has delineated certain positive duties owed by defense counsel. In order to meet the Fourth Circuit's test for effective representation counsel must, under Coles v. Peyton, 398 F.2d 224 (4th Cir. 1968),

1. Confer with the client early, and as often as necessary;

2. Advise him of his rights;

3. Ascertain all defenses that may be available and develop all appropriate defenses;

4. Conduct all necessary investigations;

5. Allow himself time for reflection and preparation.

In cases such as State v. Anderson, 117 N.J. Super, 507, 287 A. 2d 234 (App. Div. 1971); Kott v. Green, 303 F. Supp. 821 (N.D. Ohio 1968); State v. White, 5 Wash. App. 283, 487 P.2d 242 (1971), rev'd 81 Wash. 2d 223, 500 P.2d 1242 (1972); and State v. Fulford, 290 Minn. 236, 187 N.W. 2d 270 (1971), it has been recognized that an effectiveness of counsel standard would be more funtional if it were more like malpractice standards. Several such tests have been formulated such as: whether counsel's performances was at the level of normal competency, or of normal customary skill and knowledge, or whether the attorney performed at least as well as any attorney with ordinary training in the legal profession, or exercises the usual amount of skill and judgment exhibited by an attorney conscientic

seeking to protect his client's interests, or "to hold counsels assistance ineffective if no reasonable attorney would have so acted". These provide a standard capable of application by a court since the court could evaluate a particular attorney's practice in light of the normal and customary skill exhibited in the courtroom. Under such formulations the relevant questions should be whether counsel's behavior was such that reasonable, competent and fairly experienced defense lawyers might debate its propriety. If such debate may exist, assistance would not be in effective. Such a finding of ineffective representation should reverse the defendants conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

In State v. Harper, 57 Wis. 2d 543, 205 N.W. 2d 1 (1973) the Wisconsin Supreme Court adopted the ABA Standards for the Defense Function as partial guidelines to the determination of effectiv representation.

In short, a test which focuses on whether defense counsel held up his part in the judicial process and examines whether defense counsel in a particular case fulfilled his role in relation to the judge and prosecutor is more workable than prior "mockery of justice" tests which have concentrated on the trial as a whole searching for such gross incompetence that would force an appellate court "gripping the arms of their chars" to reverse and remand.

The Sixth Circuit in Beasley v. United States, 491 F.2d 687 (1974) recently withdrew from the "mockery of justice" group and now uses a more objective ground. They upheld that the assistance of counsel required under the Sixth Amendment is:

> reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness of incompetence. (Citing cases) Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations. (Citing cases) . . . Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely matter. (Citing cases) . . . Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected the defendant and was reasonably forseeable as such before trial. (Citing cases) If, however, action that appears erroneous from hindsight was taken for a reason that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective.

Appellant thus contends that under any of the above objective standards the failure to investigate and call a witness that a criminal defendant advises counsel would be of assistance in his defense is incompetence under the above formulations in that such failure to act blots out a substantial defense and contributed effectively to a conviction. Petitioner urges this court to over rule the old Alires standard. That is, appellant contends that the evidence in this case shows that all defenses available under the law were not presented because of failure of counsel to present a certain witness and as such appellant's conviction was obtained

without the effective assistance of counsel and therefore should be nullified.

CONCLUSION

For the reasons above stated, that the court below erred in denying appellant's petition for a writ of habeas corpus because appellant was denied due process of law at his trial because he was not effectively represented by counsel at trial, appellant respectfully submits that the judgment of the court below should be reversed with directions that appellant be released from respondent's custody.

DATED this ____ day of August, 1976.

Respectfully submitted,

BRUCE C. LUBECK
Attorney for Appellant